REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 17 OF 2017

JOSEPH CHACHA BURUNA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. G. Sagero, Senior Resident Magistrate in Kehancha Senior Principal Magistrate's Criminal Case No. 788 of 2015 delivered on 29/05/2017)

JUDGMENT

1. By a consolidated charge sheet the appellant herein, **Joseph Chacha Buruna,** was jointly charged with one Mbushiro Gisune Muchuma alongside another who was then not before court with the charge of **school breaking and committing a felony** contrary to **Section 306(a)(b)** of the **Penal Code**, Chapter 63 of the Laws of Kenya. The appellant faced an alternative charge of **handling stolen goods** contrary to **Section 322(1)(2)** of the **Penal Code**.

2. The particulars of the charges were as follows: -

> ***"On the night of 1st and 2nd day of July, 2015 at Kuguyi Primary School, in Kuria West District within Migori County, jointly with another not before court broke and entered a building namely staff room of Kuguyi primary School and committed therein a felony namely stealingt ad did steal 765 pieces of 30 gauge iron sheet valued at Kshs. 60,800/= the property of the said school.***
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> ***'On the 2nd day of July 2015 at Ihore village in Kuria West district within Migori County, otherwise trhan in the course of stealing, dishonestly retained 43 pieces of 30 gauge iron sheets valued at Kshs. 34,400/= knowing or having reason to believe them to be stolen goods."***

3. The appellant denied all the counts as the then co-accused likewise denied the principal charge. A trial followed which culminated with the conviction of the appellant on the alternative charge of handling stolen goods and he was sentenced to 7 years imprisonment. The co-accused was however acquitted.

4. The prosecution called 7 witnesses. **PW1** was the complainant one **Mrs. Bonny Angaya Francis** who was the Head Teacher of Kuguyi Primary School in Kuria West District within Migori County. **PW2** was **Mr. Jackson Muruka Were** who was the Deputy Head Teacher of Kuguyi Primary School whereas **PW3** was the Chief of Bukira North Location one **Johnnes Nyamboha Marwa**. The Assistant Chief of Kiomokebe Sub-Location one **Ezekiel Kangguria Mwita** testified as **PW5**. The Chairman of Kuguyi Primary School testified as **PW4**. He was **Samwel Wangiti Chacha**. The School watchman one **Thomas Mwita Chacha** testified as **PW6** and the investigating officer **No. 49084 Sgt. Samson Kataka** from Kuria East CID Office testified as **PW7.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court and the Kuguyi Primary School to as '**the School**'.

5. It was the prosecution's case that sometimes in 2014 the School through the Constituency Development Fund bought 80 pieces of iron sheets and some timber for purposes of improving its infrastructure. The iron sheets were duly received by PW1 and she marked them accordingly before keeping them in the staff room. In the morning of 02/07/2015 PW2 was informed by one **Sara Antony** (not a witness) that the staff room had been burgled into and some iron sheets stolen. PW2 rushed and confirmed the incident. The grilled-window to the staff room had been cut and 76 pieces of the iron sheets stolen. Only 4 iron sheets were left. PW2 immediately called PW4 and the School's senior Teacher one **Chacha David** (not a witness) and informed them of the incident as he could not reach PW1 who was out of the school on official duties. Shortly, PW4 arrived at the School and he was followed by PW1 and the senoir teacher.

6. PW3 and PW5 were informed of the incident as well as the police. The students were also sent home to bring their parents so that they could be informed of the incident. When the parents came to the School and were briefed of the incident a search was organized and they followed the footprints as it had rained and the footprints were visible on the ground. The search took the whole day with the aid of the police but in vain. As they returned to the School later that afternoon they received some information from an informer that the iron sheets were at the home of the appellant. Since they had already visited the home and searched in vain they nevertheless returned and as they were nearing

the homestead they saw the appellant driving some cattle uphill and he did not return. The police peeped through the door to a tobacco barn which was within the compund of the appellant's homestead and saw the iron sheets. They broke the door and recovered 43 pieces of the iron sheets which PW1 recognized as those she had marked.

7. The iron sheets were taken to Kehancha Police Station where they were photographed by officers from the Scenes of Crime Unit and then they were released to the School. The police began hunting for the appellant who went missing until 10/10/2015 when he was arrested in Kehancha town. The appelant implicated the co-accused who was also arrested and they were jointly charged.

8. At the close of the prosecution's case, the trial court placed the appellant and his co-accused on their defences. The appellant opted for and gave unsworn testimony and called his wife as a witness. The appellant denied committing the offence and stated that on the said night he slept at his home and did not leave his house and that he was surprised to learn that iron sheets were recovered from the barn which he had locked and the padlock was not broken. According to her evidence, the wife of the appellant witnessed the recovery exercise and she was very sure the iron sheets must have been placed therein during the night. She also confirmed that the appellant and her owned the barn.

9. By a judgment rendered on 29/05/2017 the trial court found the appellant guilty of and convicted him of the alternative charge of handling stolen property. The appellant was then sentenced after tendering his mitigations.

10. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal. He filed the Petition of Appeal on 14/06/2017. The appellant raised the following three grounds:

> ***a. THAT I pleaded not guilty to the charge hearein.***
>
> ***b. THAT the trial court erred in both law and facts by convicting and sentencing me a harsh and excessive sentence on circumstantial evidence.***
>
> ***c. THAT the trial court erred in both law and facts by refusing to consider my mitigations and defnse.***

11. At the hearing of the appeal the appellant appeared in person and filed his written submissions wherein he expounded on the grounds of appeal. While admitting that the iron sheets were found in his barn he denied knowledge thereof and contended that he was framed by the local security commitee commonly known as the '*Ritongo*'. The appellant further argued that his right under **Article 49(1)(f)** of the **Constitution** was infringed and that he was not accorded a fair trial hence he was entitled to an acquittal. He also argued that since the informer was not disclosed then that piece of evidence ought to be disregarded. He cited the case of **Patrick Kabui Maina vs. Rep. Criminal Appeal No. 89 of 1989** (unreportred) in support of the submission.

12. The State opposed the appeal and submitted that the doctrine of recent possession placed the appellant as the culprit. The Court was urged to consider the record and dismiss the appeal.

13. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

14. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of handling stolen property were proved and as so required in law; beyond any reasonable doubt. The starting point is the law.

15. **Section 322** of the **Penal Code** defines the offence of handling stolen property as follows: -

> ***"(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believbe them to be stolen goods he dishoneslty receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.***
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> ***(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.***
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> ***(3) For the purposes of this section-***
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> > ***(a)goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and 'steal' means so to obtain;***
> >
> > ***(b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possesssion or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of teh stealing.***
>
> ***(4) Where a person is harged with an offence under this section-***
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> > ***(a) it shall not be necessary to alleged or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods.***

(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the gods teh subject of the charge, or of his undertaking or assisting in, or arranging to undetake or assist in, their retenttion, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods-

(i) evidence that he has h ad in his possession, or has undertaken or assisted in the retention, removal disposal or relaization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;

(ii) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.

16. The ingredients of the said offence were summarily stated in the case of **Tembere vs. Republic (1990) KLR 393** as follows: -

"...One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen.....Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc.."

17. Turning to the facts of the case, there was no doubt that the appellant was aware of the theft of the iron sheets at the School. He stated in his defence thus: -

"...when I saw a crowd of people at my home looking for iron sheets. I came and helped in searching and we did not recover anything they went. In the evening the people and vehicles returned. While I was at the river I heard screams...Later iron sheets were found in the store and I was surprised who placed them there since the store was locked. I did not know how the iron sheets were brought to my premise. I did not know that there were iron sheets at my shade since I had locked it and the lock had not been removed."

18. But the appellant denies any knowledge or possession of the stolen iron sheets despite having been found in his store. **Section 4** of the **Penal Code**, Chapter 63 of the Laws of Kenya defines **possession** as follows:-

(a)"be in possession" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody ad possession of each and all of them;"

19. The search team visited the appellant's home in the morning and conducted a search in the presence of the appellant where the apellant fully co-operated. The search did not realize anything. The evidence is not clear whether the store or barn where the iron sheets were eventually found was also searched. When the team returned later in the evening the appellant was not at his home but at the river where he heard people screaming in his home. The appellant did not however bother to find out what the issue was but disaappeared for over three months. He indeed relocated to Kehancha town where he lived in a rented house. Ordinarily, the appellant was expected to find out what the screams from his home were all about, but he cared not and instead disappeared.

20. There is as well the evidence of PW1, PW3, PW5, PW6 and PW7 that when the search team returned to the home of the appellant they only found a little boy and when they asked him to open the store the boy also disappeared. That, since the wife of the appellant was also not at home the police broke into the store. I am convinced that the wife of the appellant was not at home when the search team returned otherwise she would have showed up and hopefully opened the store voluntarily.

21. The appellant gave his unsworn defence in denying the offence. He did not raise the issue of having been framed up by the local security committe during the entire trial. The issue only arose at the hearing of the appeal.

22. By placing the totality of the prosecution's evidence on one hand and the evidence of the appellant and his wife on the other hand and on the guidance of the law, I find and hold that the conduct of the appellant clearly demostrated that the appellant was aware of the presence of the stolen iron sheets in his store. The first element of the offence was hence proved.

23. As to whether the appellant dishonestly received or retained the iron sheets, still the totality of the evidence unerringly confirm that position.

24. I will now consider the other grounds tendered by the appellant. On whether **Article 49(1)(f)** of the **Constitution** was breached and that entitled the appellant to an acquittal, the initial charge sheet indicates that the appelant was arrested on 10/10/2015 and was arraigned before court on 12/10/2015. The record also so confirms. The 10/10/2015 was a Saturday and 12/10/2015 was the following Monday. The appellant was hence arraigned before court within the constitutional confines. The ground fails as well. On the alleged issue of contradictions and inconsistencies, I must state that I have carefully addressed my mind to the record. The alleged contradictions, if any, were adequately explained and reconciled by the court. Indeed, they were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **R =vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus: -

"...It is trite law that minor discrepancies and contradictions should not affect a conviction."

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

25. On the contention that the informer was not called as a witness, **Section 143** of the **Evidence Act**, Cap. 80 of the Laws of Kenya gives the prosecutor the discretion to choose the witnesses to testify. Not every witness interrogated or who aided the investigator during the investigations must testify before court. What the prosecutor is called to do is to marshal sufficient evidence to prove the case. However, if a crucial witness does not testify without any justification then an inference is made that the evidence would have been adverse to the prosecution. (See the cases of **Bukenya & Others -versus- Uganda (1972) EA 549** and **Nguku -versus- Republic (1985) KLR 412).** In this case, there was sufficient evidence adduced to support the charge and the adverse inference is not demonstrated.

26. The alternative count was therefore properly proved and the appellant rightly found guilty and convicted. As I come to the end of this discussion I wish to point that had the trial court considered the doctrine of recent possession, high are the chances that the principal count may have been proved against the appellant. Be that as it may, the alternative count was sufficiently proved. The appeal on conviction therefore fails.

27. On sentence, the appellant was imprisoned for 7 years out of the maximum 14 years. The sentencing court considered the mitigations tendered and the other attendant factors in sentencing. The case of **Wanjema v. Republic (1971) EA 493** dealt with principles upon which a first appellate Court may act on in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion. Being so guided, I do not see how the sentencing court erred and the the appeal on sentence likewise fails.

28. Whereas I am affirming the judgment of the trial court, I must however state that it was imperative that the judgment was to state concisely that the appellant's co-accused was not found guiltty of the main count and that he was acquitted accordingly and also that the appellant was acquitted of the principal count of school breaking and committing a felony but convicted on the alternative count of handling stolen property. That clarity is essentially necessary since courts decisions are used in the determining ones criminal history. I have addressed my mind to the said purely procedural arnormalies and I am of the very considered view that the same are curable by dint of **Section 382** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya as the same did not occassion any injustice to the appellant or at all.

29. The upshot is that the appeal is unmerited and is hereby dismissed.

DELIVERED, **DATED** and **SIGNED at MIGORI this 12th day of April 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Joseph Chacha Buruna, the Appellant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant